

STATE OF WISCONSIN

PERSONNEL COMMISSION

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BENNETT S. STARK,

Complainant,

v.

Secretary, DEPARTMENT OF
INDUSTRY, LABOR AND HUMAN
RELATIONS,

Respondent.

Case No. 90-0143-PC-ER

* * * * *

FINAL
DECISION
AND
ORDER

After having carefully considered the various arguments raised by the complainant in his objections filed on July 1, 1994, and after having consulted with the hearing examiner, the Commission adopts the attached Proposed Decision and Order as the final Decision and Order in the above matter, with the following modifications:

1. *The third sentence in Finding of Fact 3 is revised to read:*

Medical documentation from the Catholic Social Service was received by DVR in November of ~~1990~~ 1989.

This change more accurately reflects the record.

2. *Finding of Fact 28 is revised to read:*

28. On August 7, 1990, and in the course of entering information from direct charge purchase requests into FARS, complainant observed several forms which bore an approval date ~~by either Mr. McNier or Mr. Krusehek~~ that was a day ~~later than~~ before the date stamp appearing on the face of the document. All six of the direct charges (Comp. Exh. 14) bear "DILHR Purchasing" date stamps of 10:15 or 10:16 a.m. on August 7, 1990.

These changes more accurately reflect the record.

3. *The last sentence in Finding of Fact 31 is deleted and Finding of Fact 47 is added as follows:*

47. In a letter (Comp. Exh. 16) to Ms. Benavides dated August 19, 1990, the complainant identified a number of concerns he had relating to his employment. In the letter, the complainant referenced the "back-dating" issue and indicated he was in contact with an attorney. Complainant sent a copy of the letter to his attorney.

4. *The reference in Finding of Fact 33 to Resp. Exh. 17 is changed to Resp. Exh. 29.*

5. *Conclusion of Law 4 is revised to read:*

4. The respondent did not retaliate against the complainant for engaging in a protected activity under the whistleblower law, subch. III, ch. 230, Stats.

6. *That portion of the Opinion section on pages 10 and 11 entitled "Whistleblower claim" is replaced with the following:*

Complainant bases his claim under the whistleblower law on his "backdating" claim. (Finding 28) Complainant states that the practice of signing several direct charges before the stamp-in date constituted "falsification of information on state documents..., a Class E felony." Brief, p. 48

The whistleblower statute explicitly requires a written disclosure or other protected activity under §230.81, Stats., in order to be entitled to protection from retaliation. Here, the complainant points to the existence of the August 19, 1990, letter to Ms. Benavides as his protected activity. For purposes of this analysis, the Commission will assume that this letter reflects a "disclosure of information" to complainant's attorney and is a protected activity under §230.81(3), Stats. The question then is whether those individuals who decided to terminate the complainant's employment had knowledge of this protected activity and whether the termination decision was based upon the protected activity.

Here, the termination letter was signed by Mr. McNier, Richard Jerrick, director of the General Services Bureau, and Richard Wegner, Administrator of the Administrative Services Division. After the August 16th meeting with complainant and Mr. McNier and after she received complainant's August 19th letter, Ms. Benavides wrote a "Status Report Regarding Bennett Stark" (Resp. Exh. 45) which had seven attachments, including complainant's August 19th letter. Ms. Benavides concluded that complainant had been provided reasonable accommodations but was unable to meet overall standards and was not qualified to do the job. She also concluded that additional modifications to the job or tasks performed "would cause undue hardship to the work unit and adversely affect its productivity." The three individuals who signed the termination letter also signed off on Benavides' report, saying they had reviewed it and agreed to the conclusions therein. Based upon this documentation, the Commission attributes knowledge of complainant's protected activity to Mr. McNier, Mr. Jerrick and Mr. Wegner at the time of the termination decision.

However, the record shows that questions about the adequacy of complainant's performance had existed for months and that extensive documentation of the problems with complainant's performance had been prepared *before* the August 19th letter which serves as notice to respondent of the protected activity in this matter. The "Position Description Review," prepared by Mr. McNier was a very detailed review of complainant's performance and was prepared and presented before respondent had any knowledge of the protected activity as reflected in the August 19th letter to Ms. Benavides. There is every reason to believe that these concerns served as the grounding for respondent's decision. There is no basis on which the Commission could conclude that the mere reference in the August 19th letter to the "pattern of deliberate back-dating" of purchase requisitions and the listing of an attorney as also receiving a copy of the letter, means that complainant's disclosure to his attorney served as a motivation for the decision made to terminate the complainant's employment.

Therefore, the Commission concludes that the complainant has failed to establish a violation of the whistleblower law.

7. *The Commission adds the following language at the end of the first full paragraph on page 13 of the proposed decision:*

While the respondent has conceded that the complainant is handicapped and that his deficiencies in performance were causally related to his handicap, the complainant appears to contend that, though handicapped, he was performing the responsibilities of the job and his handicap was not causally related to performance problems. The latter contention is that the termination decision was premised on discriminatory animus, i.e. that his termination was a negative reaction to the existence of his handicap. To analyze this contention, the Commission applies the analytical framework described in McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 5 FEP Cases 965 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 25 FEP Cases 113 (1981). If complainant establishes a prima facie case, respondent must articulate a legitimate reason for its action and then the complainant seeks to show that the articulated reason was pretextual. The ultimate burden of persuasion rests on the complainant.

In this case, the complainant has established that he is handicapped, that respondent was aware of his handicap and that he was terminated from his employment. The respondent contends that it terminated complainant's employment due to inadequate work performance. The findings of fact describe numerous instances where the complainant's work performance was inadequate and numerous complaints received about his performance. The testimony of Mr. McNier, Ms. Fosdal and Ms. Briggs, as well as certain written notations made by Chris Ramsey, Sharon Kruschek, Georgia Manning, Mr. McNier and Ms. Fosdal as well as notations by Mr. McNier reflecting comments attributed to Eduardo Gomez, Jack Kruschek, and Jim Pautz as well as various exhibits all indicate that complainant made numerous errors in carrying out his work.

These errors must be viewed in the context of complainant's status as a probationary employee. Complainant was not a permanent state employee entitled to the application of the "just cause" standard for reviewing the imposition of discipline imposed against him. As a probationary employee he could be dismissed for reasons which might not be sufficient for the discharge of an employee with permanent status in class. Respondent established that there were significant problems with complainant's performance. These problems, rather than any perception of complainant as a handicapped employee, were

the reason for the complainant's termination. The complainant has failed to show that the reasons offered for his termination were pretextual.

8. *The following footnote is added at the end of the second sentence in the third full paragraph on page 14:*

The complainant's medical assessment referenced in Ms. Benavides' recommendations (Comp. Exh. 6) was to be "done through DVR. Mr. Miesenberg [sic], Counsel, will schedule the assessment." Ms. Benavides later wrote (Comp. Exh. 27):

Subsequent to the request for the medical assessment we learned through a DVR counselor, Jerry Meisenberg, that a medical evaluation was conducted in 1989. After securing a release for Mr. Stark we obtained the medical records.

9. *The following language is added at the end of the third full paragraph on page 14:*

The earlier evaluation had been received by the Division of Vocational Rehabilitation at the beginning of November of 1989, just four months before the complainant commenced his employment with respondent. The evaluation indicated the underlying condition was of a chronic nature, and nothing which had occurred during the course of the complainant's employment period indicated that the 1989 evaluation had become unreliable or inaccurate.

10. *The last sentence in the initial paragraph on page 16 is modified as follows so as to be consistent with the previous analysis of the case:*

The record here reflects that the conduct complained of by the complainant occurred as a consequence of his poor work performance, or for ~~other~~ reasons unrelated to his disability.

11. *The following language is added to footnote 5 on page 14:*

The probationary period of a handicapped employe can be extended pursuant to §230.28(1)(bm), Stats., to "allow the employe to do any of the following:

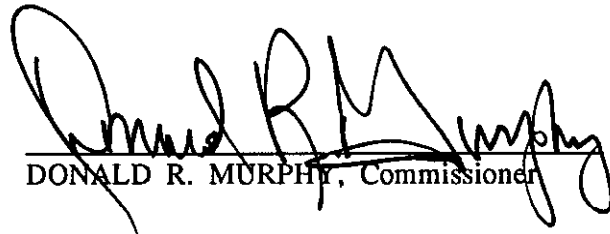
1. Complete any necessary comprehensive or vocational rehabilitation program.
2. Obtain or adapt to special modifications made to the employee's workplace to accommodate the employee's handicap.
3. Achieve the knowledge, skills and abilities to competently perform the required tasks for the position for which the employee is appointed.

None of these three reasons were indicated with respect to the complainant's employment. There is no indication that additional time would have permitted the complainant to "achieve the knowledge, skills and abilities to competently perform" the duties of the position. This is particularly true here where respondent had already provided complainant with substantial training and the complainant suggests that he was already able to perform the work. There was no additional accommodation which could have been provided the complainant during an extended probationary period which would have changed his level of performance.

Dated: September 9, 1994 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms
K:D:Cover order (Stark)


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Bennett S. Stark
1129 Drake Street
Madison, WI 53715

Carol Skornicka
Secretary, DILHR
P.O. Box 7946
Madison, WI 53707-7946

NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

STATE OF WISCONSIN

PERSONNEL COMMISSION

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Complainant, *
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Secretary, DEPARTMENT OF *
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Case No. 90-0143-PC-ER *
*
* * * * *

PROPOSED
DECISION
AND
ORDER

This matter is before the Commission as a complaint of handicap discrimination and whistleblower retaliation. The parties agreed to the following issues for hearing:

1. Whether respondent discriminated against complainant on the basis of handicap when they terminated complainant's employment as a Program Assistant 2 on August 23, 1990.
2. Whether respondent failed to accommodate complainant's handicap in regard to the terms and condition[s] of his employment as specified in the complaint.
3. Whether respondent retaliated against complainant on the basis of engaging in a protected activity under the whistleblower law (§230.80, et seq., Wis. Stats.) when they terminated his employment on August 23, 1990.

FINDINGS OF FACT

1. Complainant was awarded a B.A. from the City University of New York - Queens in 1965, a M.A. from California State University - Hayward in 1975, and a Ph. D. in History from the University of Wisconsin - Madison, in 1982.

2. Between receiving his doctorate and commencing work with the respondent in March of 1990, the complainant worked as a window salesperson, insurance salesperson, janitor, mail carrier, fiscal clerk, substitute teacher, teacher, telemarketer, painter, stockbroker, construction worker and

cab-driver. During this period of approximately 8 years, complainant worked for at least 18 different employers, including three state agencies as a limited term employee.

3. Starting in October of 1989, complainant was a client of the Division of Vocational Rehabilitation (DVR). In his initial application, complainant indicated that he suffered from depression, which qualified as a disability and entitled him to DVR services. Medical documentation from the Catholic Social Service was received by DVR in November of 1990. The materials described complainant's condition as follows:

Bennett has been involved with our agency since 10-3-84. His initial diagnosis as given by psychiatrist, Robert Linden on 10-23-84, was adjustment disorder with mixed emotional features. However, after 28 individual sessions with therapist Michael Wahle (10-3-84 to 5-2-85), Bennett returned to our agency on 1-19-88 and was subsequently diagnosed with dysthymic disorder by both his therapist and consulting psychiatrist, Robert Linden, M.D.

Dysthymia is by definition a chronic disturbance that involves a depressed mood of at least two years duration. It is frequently attended by a major depression that is superimposed on the dysthymia but which is itself relatively temporary, as well as by a personality disorder which would be a relatively permanent feature. On this latter, little attention has been paid to date, and any possible personality disorder would have to go down for now as "unspecified".

.... Because of the chronic nature of his disorder, Bennett's prognosis remains guarded, and expectations should be commensurate with the usual course for persons with this diagnosis. With regular therapy and support he can expect slow improvement.

The Diagnostic & Statistical Manual of Mental Disorders, 3d Ed. Rev. (1987), lists the following symptoms of dysthymia: depressed mood, poor appetite or overeating, insomnia or hypersomnia, low energy or fatigue, low self-esteem, poor concentration or difficulty making decisions, and feelings of hopelessness. (Resp. Exh. 21)

4. Complainant applied for and was selected for a Program Assistant 2 (PA2) position vacancy in respondent's Administrative Services Division, commencing March 5, 1990. Complainant was required to complete a six-month probationary period.

5. The PA2 position consisted of an unusual combination of responsibilities. The position description allocated time according to the following goals: 50% for "Assist Purchasing Agents in a Variety of Purchasing Functions," 35% for "Stores/Warehouse Activities" which required being able to lift 50 to 60 pounds, 10% for "ICESA/FARS Automated System" which involved data entry, and 10% for "Maintain statewide copy machine recordkeeping and invoice system." Before hiring complainant, respondent had been unsuccessful in its efforts to hire anyone off two separate registers to fill the position.

6. During the interview, complainant indicated that he could meet the lifting requirement for the warehouse work and that he also had training in Lotus 1-2-3 and on personal computers.

7. Complainant's supervisor was Bill McNier, section chief for respondent's central purchasing functions. Other employees in the unit included two purchasing agents (Jack Kruschek and Becky Briggs), two warehouse employees (Steve Eicher and Chris Ramsey) and two printing technician positions. Lois Fosdal moved from a PA3 position with invoice responsibilities into one of the printing technician positions in April of 1990.

8. Prior to complainant's arrival, the duties described in finding 5 were performed primarily by Kim Gavinski, a limited term employee. Her employment overlapped somewhat with that of the complainant.

9. For approximately the first four weeks of complainant's employment, he worked at DILHR's warehouse operation which is located near the Dane County Regional Airport. The warehouse had two full-time employees, and the complainant's position was designed to be able to fill in during an absence of one of the regular employees. The facility served as the central warehouse for all of DILHR. Complainant was instructed on how to fill requisitions for supplies found in the warehouse and how to operate the user-friendly computer system which tracked the arrival and departure of inventory at that facility. The instruction was provided by the two full-time warehouse employees.

10. During this four-week period, one of the full-time warehouse employees complained to Mr. McNier about complainant's level of performance. Mr. McNier told complainant that he had not done very well with the warehouse responsibilities but that his warehouse work would end for the time being and he would be taught the other responsibilities of the position.

11. Complainant's work location then moved to GEF 1. While there, he received introductory training on at least portions of his remaining areas of responsibility.

12. Complainant's primary purchasing responsibility was to process Direct Charge requests, i.e. requests of typically less than \$500 where an invoice was attached to the requisition and payment had already been approved. Complainant's responsibilities included checking to make sure that certain information was included on the forms when they were first received in the purchasing department, passing the materials on to a purchasing agent to be reviewed and approved, and then, when the materials came back from the purchasing agent, entering the information into the FARS accounting system. Complainant received training on this responsibility from Kim Gavinski and Lois Fosdal.

13. Complainant also was trained in certain duties related to maintaining DILHR's equipment inventory. This responsibility involved filling out a form for items of new equipment in the department, sending out the completed form along with an inventory tag to the unit in the department where the equipment was located, and, upon receiving verification that the tag had been affixed to the item, entering the information from the form into the appropriate data base. Becky Briggs and Lois Fosdal provided the training on these responsibilities.

14. The final area where complainant received training was in tracking usage levels for DILHR's copy machines. Readings from copy machines in DILHR's outlying offices were obtained by mail. Complainant went around to the machines located in DILHR's offices in GEF 1 for the readings from those machines. One machine required complainant to use a separate electronic device (a "printer-reader") to read the copy output. Lois Fosdal provided the training on these responsibilities.

15. Within one to two months after the complainant began in the position, Mr. McNier was advised that any positions becoming vacant would be subject to a hiring freeze.

16. Between April 10 and 18, 1990, Mr. McNier met with the complainant about his work performance and indicated that respondent was having problems with complainant's work and that respondent had expected complainant to be further along. During the meeting and in the context of his

concerns relating to complainant's aptitude for the assigned duties, Mr. McNier stated that the complainant was "not on the same wavelength."

17. Complainant informed Mr. McNier that complainant was suffering from depression relating to a divorce and to child support arrearages. Mr. McNier told complainant that he had to leave these pressures at home.

18. In a memo to his supervisor dated April 18, 1990 (Resp. Exh. 4), Mr. McNier noted that complainant's "progress has been slow to this point and is under review."

19. On June 1, 1990, Mr. McNier met with complainant and advised him that he was not passing probation. Mr. McNier agreed to meet with complainant and Mr. Meysembourg, complainant's DVR counselor, and that meeting was held on June 5th. Mr. McNier agreed to continue to review complainant's progress in the position. (Comp. Exh. 11)

20. At complainant's request, a staff meeting was held on June 6th. During the meeting, the complainant stated that he suffered from depression and that he recognized he exhibited symptoms of high anxiety, poor eye contact and high defensiveness. He stated that he could do the work assigned to his position. Complainant asked to be treated as a human being and asked for patience and understanding.

21. During the course of another workday, Mr. McNier told the complainant that he was "too direct" with respect to carrying out one of his duties.

22. Complainant subsequently contacted both the state's Disability Rights Coordinator (Dick Pomo) and Gladys Benavides, respondent's Affirmative Action Officer.

23. In a memo (Comp. Exh. 6) dated July 6, 1990, Ms. Benavides recommended the following actions be taken regarding the complainant:

1) A medical assessment be conducted to determine whether Mr. Stark's disability (as identified by him) impairs his ability to do his job. The assessment to be done through DVR. Mr. Miesenberg, Counselor, will schedule the assessment.

2) A workplan be developed which includes the role and responsibilities of the employee, the supervisor and the Office of Human Resources. The workplan will be implement [sic] in a 30 day period. The Office of Human Resources will monitor and evaluate the results at the end of the 30 day period. Upon completion of the evaluation the OHR will recommend follow-up actions.

3) A cover memo be included indicating that the Division will, if appropriate, provide reasonable accommodations to the employee. This will be determined by the results of the medical assessment to be conducted through DVR.

Respondent developed a one-and-one-half page position description supplement which more completely described the specific tasks assigned to the complainant's position and which set certain numerical standards for errors with respect to warehouse duties.

24. The 30 day review period or work plan was implemented. (Resp. Exh. 12)

25. Respondent's staff provided additional training to the complainant during the 30 day period, which commenced July 15, 1990. Those persons involved in working with the complainant during the 30 day period met on a weekly basis to discuss complainant's progress. Complainant was not invited to these meetings.

26. During the 30 day period, the complainant spent 3 days at the warehouse, where his work was closely reviewed by Chris Ramsey. Complainant made a number of errors while processing requisitions at the warehouse, although the number fell within the allowable rate identified in the supplemental position description. In addition, complainant inadvertently left a warehouse phone off the hook from 2:00 p.m., tying up the phone line until another employee discovered the problem at noon on the next day. Complainant also was instructed to turn off all machines before leaving, yet left on a machine used for dispensing tape. Mr. Ramsey's memo describing complainant's performance also indicated that complainant did not have "much of a 'feel' for the Stores operation" and was "very hesitant and not very efficient" in using the computer. (Resp. Exh. 20)

27. Complainant returned to his purchasing duties in GEF 1. On August 1st, Cheryl Breezer began working in the section. Ms. Breezer had previously worked in an adjacent office and already knew at least some of the purchasing staff on a social basis.

28. On August 7, 1990, and in the course of entering information from direct charge purchase requests into FARS, complainant observed several forms which bore an approval date by either Mr. McNier or Mr. Kruschek that was a day later than the date stamp appearing on the face of the docu-

ment. All six of the direct charges (Comp. Exh. 14) bear "DILHR Purchasing" date stamps of 10:15 or 10:16 a.m. on August 7, 1990.

29. The date stamp is not always a reliable indicia of when a direct charge is first received by DILHR purchasing. (Fosdal testimony)

30. The complainant concluded that Mssrs. McNier and Kruschek were backdating their signatures in order to make it appear that the complainant was spending more than three days inputting the information from the direct charge into FARS. The three day standard for processing direct charges was referred to in the supplemental position description discussed in finding 23.¹

31. Complainant spoke with Mr. Kruschek and told him the "backdating" procedure was not fair. Complainant also told Ms. Benavides of his concerns. Complainant never filed a written disclosure of his allegations/concerns.

32. Complainant occasionally checked the answers to questions he posed to his trainers by comparing their answers with the answers from others in the unit. Complainant also often repeated his questions.

33. Respondent received complaints regarding complainant's performance of equipment inventory duties. One written complaint (Resp. Exh. 32) includes the following summary:

I do not trust Mr. Stark to handle any of the tagging information for our Data Processing equipment. He is confused very easily and does not seem to grasp what is needed, why it is needed or how to use the Property System. Every time I have dealt with him and thought we had a matter settled, he calls at a later date or time and sounds like the matter has never been discussed. At first I thought it was because he was new and unfamiliar with data processing terminology and the FARS Property System. However, that does not seem to be the case. He is also very persistent and almost discourteous and impatient and continues to call if you are not at your desk and cannot respond to his call immediately.

Complainant made numerous errors relating to the inventory function. (Resp. Exh. 17, and Briggs testimony) Complainant's problems in performing these responsibilities reached the point that Ms. Briggs took much of the work back from the complainant and performed it herself. (Resp. Exh. 29, McNier testi-

¹Respondent stipulated at hearing that it was not using the three day standard as a basis for its contention that complainant's work was unsatisfactory.

mony) Ms. Briggs has trained two other people on the inventory responsibilities. Both caught on to the system much more quickly, did not repeat their errors, did not require reiteration of the instructions and could work more independently than complainant.

34. Complainant's method for obtaining auditron readings from satellite copy machines generated a written complaint dated September 14, 1990. (Resp. Exh. 36) The document set up by the complainant for recording the monthly readings over a fiscal year (Resp. Exh. 35) was set up illogically in that it did not list the machines in sequence by room (as in Resp. Exh. 38) or by department unit.

35. The instructions provided by Ms. Fosdal to the complainant for using the the "printer-reader" to determine the copy output for one of the machines specifically indicated that the device was to be turned off between monthly readings. Complainant neglected to turn the device off after he used it at the beginning of July. When complainant tried to use the device at the beginning of August, it did not operate. The device was ultimately replaced by the manufacturer after complainant spent at least 4 hours making telephone calls in an effort to make it operable.

36. Complainant made numerous errors in carrying out his direct charge responsibilities. For example, he used the vendor code for the Capital Times for an invoice from the Wisconsin State Journal. (Resp. Exh. 23) He used the vendor code for the American Welding Society in Florida when completing a form for a Watertown, Wisconsin welding firm with the name of American Welding. (Resp. Exh. 10) He did not follow up on an incomplete request for an extended period. (Resp. Exh. 11) He did not maintain a listing of "dummy" vendor codes which had been supplied to him for use. (Resp. Exh. 13, Stark testimony, Fosdal testimony, McNier testimony) He directed payment on an invoice to the wrong address. (Resp. Exh. 14) When complainant did not perform his direct charge responsibilities correctly, others had to step in. (Resp. Exh. 25)

37. Despite having indicated during his employment interview that he was experienced with Lotus 1-2-3, complainant encountered severe difficulties in using it in the course of his employment. (Resp. Exh. 26, Fosdal testimony)

38. Respondent received a complaint from an employee in another unit relating to complainant's difficulty in understanding the direct charge procedure for copier invoices received after the expiration of a lease agreement period. (Resp. Exh. 22)

39. Respondent did not attempt to keep track of every error made by the complainant during the 30 day period or during his employment generally. Ms. Briggs was still finding errors by the complainant nearly three years after his employment with respondent ended.

40. Mr. Meysembourg scheduled the medical assessment. There were delays in getting the assessment completed.

41. At no time during his employment was the complainant actually assigned all of the duties that were set forth in his position description.

42. Despite extensive training, complainant was not adequately performing the duties of his PA2 position. The excessive amount of time spent on training the complainant had an adverse effect on the productivity of the purchasing unit. (McNier testimony)

43. Complainant never requested an accommodation other than as indicated in finding 20.

44. Complainant met with Mr. McNier and Ms. Benavides on August 16, 1990 to discuss the results of the 30 day workplan. The medical evaluation requested by Mr. Meysembourg had not been completed, but the respondent was provided copies of the medical information submitted to DVR in 1989 and referenced in finding 3. (Comp. Exh. 27) Respondent concluded that the complainant's job performance was unacceptable and in a letter dated August 23, 1990, terminated his employment at the end of that work day.

45. On September 4, 1990, complainant's DVR counselor, Mr. Meysembourg, received the medical assessment from Psychologist Jonathan K. Lewis. The evaluation stated in part:

Overall, [complainant's] picture is one of a central theme of narcissism which is likely to manifest in intrapersonal relationships as distance, an attitude of somewhat inflated self-importance, and a subjective impression from people around him of an arrogant and distant attitude. He may be perceived as socially intimidating and probably processes the consequent distance from people as social alienation and rejection which is undeserved, and which results in a chronic sense of isolation, distance and, subjectively, depression.

Certainly his posture with co-workers, as he describes it, is supportive of this conceptualization from psychometric assessment. It is also highly likely that his somewhat distant presentation and his possibly arrogant attitude hides very deep insecurities and a poor self-image. It is an unfortunate characteristic of this personality formulation that he will see the difficulties as emanating from forces beyond his control, will tend to see himself as a helpless victim in many situations that are troublesome for him and, consequently, will have difficulty incorporating locus of control for his difficulties into his own actions and attitudes. This, unfortunately, results in a continuation of the kinds of conflicts and distance that he has experienced in job situations and is likely to result in a poor prognosis over a long period of time.

* * *

My recommendation would be for Mr. Stark's program to include individual psychotherapy that will likely have to continue for a period of months to years before significant progress is made in his essentially alienated posture with regard to persons around him.

46. After complainant's departure, the PA2 position was initially cut from full-time to half/time, and then was eliminated altogether.

CONCLUSIONS OF LAW

1. The complainant is handicapped.
2. The respondent did not fail to accommodate the complainant's handicapping condition during the course of his employment.
3. The respondent did not discriminate against the complainant on the basis of his handicap when it terminated his employment as a Program Assistant 2, effective August 23, 1990.
4. The complainant did not make a disclosure under §230.81, Stats., so as to entitle him to protection under the whistleblower law, §230.83, Stats.

OPINION

Whistleblower claim

Complainant bases his claim under the whistleblower law on his "backdating" claim. (Finding 28) Complainant states that the practice by Mr. McNier and Mr. Kruschek of signing several direct charges before the stamp-

in date constituted "falsification of information on state documents..., a Class E felony." Brief, p. 48

The whistleblower statute explicitly requires a written disclosure or other protected activity under §230.81, Stats., in order to be entitled to protection from retaliation. The complainant has made no allegation² that he complied with these statutory requirements and there is nothing in the record to support such a conclusion. Complainant suggests that it was "unrealistic" to expect him to place his information in written form because of the strained atmosphere in the workplace. However, engaging in a protected activity is a necessary element in establishing a prima facie case of whistleblower retaliation. Complainant's whistleblower claim must be dismissed because he did not make a protected disclosure.

Handicap Claims

As indicated by the Commission in Harris v. DHSS, 84-109-PC-ER, 85-0115-PC-ER, 2/11/88, a typical handicap discrimination case will involve the following analysis:

- (1) Whether the complainant is a handicapped individual;
- (2) Whether the employer discriminated against complainant because of the handicap;
- (3) Whether the employer can avail itself of the exception to the prescription against handicap discrimination in employment set forth at §111.34(2)(a), Stats., i.e., whether the handicap is sufficiently related to the complainant's ability to adequately undertake the job-related responsibilities of his or her employment. This determination must be made in accordance with §111.34(2)(b), Stats., which requires a case-by-case evaluation of whether the complainant "can adequately undertake the job-related responsibilities of a particular job";

²In his reply brief, complainant states that he reported his information about "backdating" to the Personnel Commission on August 31, 1990, to the Department of Justice in September, and to an attorney in private practice in August. These statements are not reflected in any evidence presented at hearing, so they cannot serve as the basis for a finding of fact. Even if this information was part of the record, these "disclosures" appear to have been made after the alleged retaliatory action, i.e. the termination. And even if the contact with the attorney in August preceded the termination decision, there has been no allegation that the respondent was aware of this alleged contact at the time the termination decision was made.

(4) If the employer has succeeded in establishing its discrimination is covered by this exception, the final issue is whether the employer failed to reasonably accommodate the complainant's handicap.

Respondent concedes that complainant is handicapped and also concedes that "its termination of Complainant was based on deficiencies in his performance which are causally related to some handicap, whether Mr. Stark's version of his handicap or Dr. Lewis's." Brief, p. 3

The relevant portions of Dr. Lewis's psychological evaluation of complainant are set out in finding 45. Complainant takes the position that he suffers from dysthymia, which was the diagnosis set forth on materials submitted at the time he began working with Jerry Meysembourg of DVR. The definition and typical symptoms of dysthymia are set forth in finding 3. However, instead of the symptoms as listed in the treatise which was admitted as an exhibit, complainant contends that his particular symptoms are poor eye contact, a high degree of defensiveness, and high anxiety.

By conceding both the existence of a handicap and causal relationship, the analysis advances to the question of whether the complainant could adequately undertake the job-related duties of the position for which he was hired.

The Commission concludes that the complainant was unable to adequately perform these responsibilities. It is undisputed that the complainant never performed the full range of responsibilities identified in his position description. He never mastered some of the more basic responsibilities, so he could not move on to some of the more complex duties. Some of those responsibilities which he performed initially were pulled back from him because of problems with the level of his performance. The appellant's contention that he was adequately performing the duties he was assigned is contrary to the vast weight of the evidence, including the testimony of Ms. Briggs, Ms. Fosdal and Mr. McNier, as well as the documents supplied by both parties which showed numerous complaints regarding complainant's performance, numerous errors and substantial time invested by respondent in the training process. The section chief, Mr. McNier, was doubly interested in having the complainant work out in the PA 2 position because of the hiring freeze that went into effect shortly after complainant started working. Mr. McNier realized that if the complainant was not retained, the position would probably disap-

pear.³ Mr. McNier's concerns that he would lose the position if the complainant did not pass probation reinforces the testimony of witnesses that respondent spent a great deal of time training the complainant in an effort to retain him in the position.

Complainant's exhibits and his conduct during the hearing in this matter closely tracked the performance problems articulated by respondent as being a basis for its termination decision. Several of complainant's exhibits (34, 39 and 40) reflect a very disorganized approach to a particular task. These exhibits, which include the complainant's notes taken during some of his training, reflect numerous modifications. The changes are of such a degree that the notes are difficult to read and understand. During the hearing itself, the complainant exhibited poor organization skills in that he frequently had difficulty finding documents because of the way he had them organized and marked. The record also shows that the complainant was unable to distinguish between offering testimony and making argument, even though the distinction was repeatedly explained to him and even though numerous objections by respondent were sustained on this point. The Commission recognizes that the complainant appeared pro se and cannot be expected to present a case in the same manner as an experienced attorney. However, the hearing lasted six days and the complainant had the same difficulties with his exhibits and the same inability to distinguish testimony from argument throughout the proceeding. The conduct of the complainant during the hearing strongly supports the respondent's view that the complainant was unable to satisfactorily perform the PA2 duties assigned to him, despite repeated training efforts.

Accommodation

There is no indication that there were any reasonable accommodations available which would have allowed the complainant to have been able to adequately perform the duties of the position.⁴ Respondent provided additional training and, after initially determining that complainant's work was unacceptable, gave him an additional opportunity to show that he could satisfactorily perform the job. Because of the additional time requirements associated with trying to assist the complainant to overcome the difficulties he was hav-

³As shown in finding 46, this is what ultimately occurred.

⁴The complainant has consistently asserted that he could perform and was satisfactorily performing the duties of the position.

ing with the job, management was concerned about the whole section getting behind in its work. (McNier testimony)

By the end of his 30 day review period, the complainant was still not close to performing the full range of duties set forth in his position description and he was still making numerous errors. Accuracy was an important element of the complainant's job and of the section's overall responsibilities.

The complainant contends that the respondent failed to live up to the specific terms of the recommendations by Ms. Benavides (finding 23) and that the respondent otherwise failed to accommodate his disability during the course of his employment.

The evaluation from Mr. Lewis was not received by Mr. Meysembourg until September 4, 1990, nearly two weeks after complainant's employment had been terminated. Even though the respondent did not have the benefit of the Lewis evaluation, respondent had received, on or about July 31, 1990, the 1989 medical evaluations of the complainant that had been submitted to DVR. It was not unreasonable for the respondent to rely on the previous year's evaluation. Ms. Benavides testified that she did not learn of the existing evaluations until after she had initially developed her recommendations. Because she had concluded that the nature of the disability had not changed in the interim, it was appropriate to rely on the 1989 evaluation rather than to wait for a new evaluation. In addition, the complainant's probationary period was scheduled to end on September 4, 1990 (Resp. Exh. 45) and delaying the decision in order to obtain the Lewis decision without extending the probationary period would have caused the complainant to obtain permanent status in class.⁵

During the course of the 30 day review period, additional training was provided to the complainant and his work performance was carefully analyzed. Complainant was provided this additional period to see whether he could satisfactorily perform the responsibilities assigned to his position, after Mr. McNier had concluded in the 3 month evaluation to terminate his employment. The additional period was, by itself, a very significant accommodation.

⁵Pursuant to §ER-Pers 13.09, Wis. Adm. Code: "Permanent status in class is attained immediately upon completion of the last work period to which the employe was assigned to work during his or her probationary period regardless of whether it falls on or before the last day of the probationary period."

The complainant did not make any request for accommodation during his employment other than to ask that he "be treated like a human being" and to ask for "patience and understanding." The record indicates that the complainant was handled with considerable patience and understanding during his employment. The complainant's theory appears to be that proper accommodation would have meant that, due to the nature of his disability, he not be subjected to any negative comments or analysis, and that his co-workers be required to treat him as a close friend. The complainant's feeling that he was not socially accepted in the work unit was voiced frequently during the course of his testimony.

The Commission is unaware of any aspect of the Fair Employment Act that requires a new employee to be woven into the center of the social fabric associated with the workplace. Even if there were such a requirement, the evidence indicates that the complainant's feelings on this topic are not tied to "poor eye contact, high anxiety and high defensiveness." The record indicates that the complainant was given the normal introduction for a new employee, but there is no evidence that he made an effort to engage in the social amenities to which he felt others should have provided to him. There is no evidence that complainant sought out new friends in his new working environment. Ms. Fosdal testified that complainant did not invite her to lunch, just as she did not invite him to lunch.

No reasonable accommodation could have been provided to the complainant that would have allowed him to satisfactorily perform the duties assigned to his Program Assistant 2 position.

Hostile Environment

In his brief (page 38), complainant added a hostile environment allegation, even though it was not identified as an issue prior to hearing. As evidence of a hostile environment, complainant points to being excluded from weekly staff meetings, preferential treatment of another new employee, Cheryl Breezer, comments made by Mr. McNier, and certain conduct by Ms. Fosdal.

Harassment, i.e. a hostile work environment, based on handicap is not specifically identified in the Fair Employment Act under §111.34, Stats.⁶

⁶That statutory provision merely provides certain examples of handicap discrimination. The prefatory language in §111.34(1), reads: "Employment discrimination because of handicap includes, but is not limited to...."

However, it falls within the general prohibition against discrimination in the "terms, conditions or privileges of employment" set forth in §111.322, Stats. In analyzing any hostile environment allegation, a key element is that the conduct must be engaged in because of the complainant's protected status, in this case as a handicapped individual.⁷ The employer is not liable unless it is established that the employer acted intentionally because of the employee's protected status. See, Intl. Brotherhood of Teamsters v. United States, 431 U.W.324, 335, 52 L. Ed. 2d 396, 415, 97 S. Ct. 1843, n. 15 (1977):

"disparate treatment"... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

The record here reflects that the conduct complained of by the complainant occurred as a consequence of his poor work performance, or for other reasons unrelated to his disability.

As noted in finding 27, Ms. Breezer had worked in an office adjacent to the purchasing unit, so when she came on board shortly after the complainant, she already had 5 years of social relationships built up with some members of the purchasing staff. It is not unreasonable to expect that Ms.

⁷The EEOC published proposed guidelines on harassment based on race, color, religion, gender, national origin, age or disability in the October 1, 1993 Federal Register (58 FR 51266). The proposed guidelines, which relate to the EEOC's authority under both Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, have yet to be adopted. The proposed guidelines include the following language:

(b)(1) Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her... disability....

* * *

(2) Harassing conduct includes, but is not limited to, the following:
(i) Epithets, slurs, negative stereotyping, or threatening, intimidating or hostile acts that relate to... disability and
(ii) Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of... disability and that is placed on walls, bulletin boards, or elsewhere on the employer's premises, or circulated in the workplace.

Breezer would continue her friendships when she transferred into her new work unit. The record also established that the staff meetings to which complainant was not invited were meetings specifically called to deal with the ongoing training of the complainant. Complainant also contended that a comment he overheard Ms. Briggs say to Ms. Breezer ("We take care of our own.") is indicative of a hostile environment. However, complainant had no recollection of the context of this comment and there is nothing to suggest that it was in anyway directed at the complainant.

The "wavelength" comment made by Mr. McNier (finding 16) could, if viewed in isolation, be construed as relating to the complainant's handicap. However, Mr. McNier testified that the comment was made in the context of his concerns relating to the complainant's aptitude for the duties he had been assigned to perform. While the complainant may have interpreted the comment as something of an epithet relating to his handicap, the Commission disagrees with that conclusion. The phrases "different wavelength" and "same wavelength" can have different contexts, but there is no evidence that it was used here as a slur.

Finally, the complainant alleged that on two unspecified dates, Ms. Fosdal "ripped papers" out of his hands. Complainant also alleges that after discovering that the "printer-reader" was not working (finding 35), he asked Ms. Fosdal where the batteries were and she "bellowed" at him: "What do you think I am, a secretary?" Ms. Fosdal denied making the latter statement and testified that she did not recall taking papers out of complainant's hands. Ms. Fosdal acknowledged that on another occasion she became very frustrated with the complainant. According to Ms. Fosdal, she had previously trained the complainant four or five times on how to use the Lotus 1-2-3 spreadsheet and the training had been unsuccessful. She decided to try a different approach and asked the complainant to explain to her what he understood the process to be. Complainant sat in front of the machine and said, "Well Lois, if you think I know what I'm doing, you're wrong." Ms. Fosdal responded by saying, "Well, first you might want to turn the PC on."

The nature of the complainant's work performance was such that some frustration on the part of the trainers and co-workers was inevitable. Even accepting the complainant's version of events as true, the conduct by Ms. Fosdal related to the complainant's work performance, rather than to his

handicap. The complainant has failed to establish the elements necessary for a finding of a hostile work environment.

ORDER

This complaint is dismissed.

Dated: _____, 1994 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms
K:D:Merits-hcp/wb (Stark)

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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